84-1386 (D)

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

MICHAEL J. MORRISSEY,

Petitioner

v.

WILLIAM MORROW AND COMPANY and
BANTAM BOOKS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Richard W. Affolter
Pierson, Affolter & Wadhams
253 South Union Street
Burlington, VT 05401
(802) 863-2888

Attorney for Petitioner

Michael J. Morrissey
9419 Talisman Drive
Vienna, VA 22180
(703) 255-7033

Local Counsel, pro se
for Petitioner

41pp

QUESTION PRESENTED FOR REVIEW

Whether the lower court abused its discretion in dismissing Petitioner's case when Petitioner promptly filed its Motion for Reinstatement upon learning of a final Supreme Court decision in a case where

(1) The parties had agreed by Stipulation to withhold further proceedings on the appeal until the Supreme Court's judgment was entered in the case of Keeton v. Hustler Magazine, whereupon it was agreed that the Petitioner would have 30 days thereafter to proceed with its appeal; and

(2) Petitioner filed its Motion for Reinstatement of the Appeal within 30 days of the date it became aware of the U.S. Supreme Court's Opinion in Keeton v. Hustler Magazine, but not within 30 days of the Opinion itself, which Respondents argue should control without regard to the subsequent 25-day period before Judgment actually issues under the Supreme Court's Rules.

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LIST OF APPENDICES

Appendix A

Appellant's Motion for Reconsideration by a panel of Judges of Judge Pierce's June 20, 1984 Order denying Plaintiff-Appellant's Motion for Reconsideration; and the Court's Order denying same, dated September 18, 1984.

Appendix B

Letter of November 11, 1983 from Appellant's Counsel to Appellee's Counsel relating to Stipulation to be entered in the case.

Appendix C

Affidavit of Appellant's Counsel dated June 28, 1984 relating to when he first became aware of the decision in Keeton v. Hustler Magazine.

Appendix D

Appellant's Motion for an Extension of Time to Reinstate Appeal and for Reinstatement of the Appeal, and the Court's Order denying same, dated June 4, 1984.

Appendix E

Appellant's Motion for Reconsideration of the Court's June 4, 1984 denial of Appellant's Motion, with statement attached in support of Motion of Reconsideration; and Court's denial of same dated June 20, 1984.

No.

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1984

MICHAEL J. MORRISSEY,

Petitioner,

vs.

WILLIAM MORROW AND COMPANY
and BANTAM BOOKS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO
UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

To the Honorable Chief Justice of the United States, and to The Associate Justices of the United States Supreme Court:

Petitioner Michael J. Morrissey files this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for

the Second Circuit which dismissed Petitioner's appeal then pending in that Court on the basis of the timeliness of Petitioner's filing of its Motion to Reinstate said appeal pursuant to an agreed Stipulation and agreement the parties had filed with the Court.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

This Petition is based upon the ruling of the Court of Appeals which denied Petitioner's Motion for Reconsideration of Reinstatement of Petitioner's Appeal.

STATEMENT ON GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

By Order dated June 4, 1984, the Court of Appeals entered its Order denying Petitioner's Motion to Reinstate its appeal. Petitioner filed a Motion for Reconsideration which was denied by

Order dated June 12, 1984. Petitioner then filed a Petition for Rehearing and Suggestion for Rehearing en banc on June 28, 1984. On August 7, 1984, oral argument was held before a panel of judges. An Order dated September 18, 1984, was thereafter entered which denied Petitioner's Motion for Reconsideration.

Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

Rules of the Supreme Court of the United States, Rule 51:

"...1. A petition for rehearing of any judgment or decision other than one on a petition for writ of certiorari, shall be filed within 25 days after the judgment or decision, unless the time is shortened or enlarged by the Court or a Justice..."

And Rule 52:

"...2. In a case coming from a state court, mandate shall issue as of course after the

expiration of 25 days from the day the judgment is entered.... The filing of a petition for rehearing, unless otherwise ordered, will stay the mandate until disposition of such petition, and if the petition is then denied, the mandate shall issue forthwith. ...

.3. In a case coming from a federal court, a formal mandate will not issue, unless specially directed; ... In all other respects, the provisions of paragraph .2 apply."

STATEMENT OF THE CASE

This action was commenced with Petitioner's filing of his Complaint on November 12, 1982, in the United States District Court for the District of Vermont. The Complaint contained three counts which alleged libel and defamation, invasion of privacy, and injurious falsehoods by each Respondent and both Respondents jointly. The Complaint also contained a count seeking declaratory relief in the form of an injunction prohibiting further

publication and distribution of this material. The material described in the Complaint is the hardback publication of a book entitled "Spooks" published by Respondent William Morrow and Company, and the subsequent paperback version of the same book published by Respondent Bantam Books, Inc. Jurisdiction is conferred upon that Court by 26 U.S.C. § 1332, and venue exists in the District where the case was filed by reason of 28 U.S.C. § 1391.

Following service on the registered agent of Respondents, a Motion to Dismiss was filed in which Respondents sought dismissal of the Complaint on the ground that the U.S. District Court for the District of Vermont lacked personal jurisdiction over the Petitioner. In the alternative, Respondents asked that the action be transferred to the Eastern District of Virginia.

In February, 1983, Petitioner filed his first set of interrogatories to each Respondent in which it sought, inter alia, information uniquely in the

possession of each Respondent which is probative to the issues raised in Respondents' Motion to Dismiss. On April 15, 1983, Petitioner filed its Memorandum in Opposition to Respondents' Motions to Dismiss or Transfer. On July 29, 1983, the Court issued its Opinion and Order which granted Respondents' Motion to Dismiss.

On August 25, 1983, Petitioner did file its Notice of Appeal to the Second Circuit from the District Court's July 29, 1983 Order. Shortly after the filing of that appeal, and pursuant to discussions between counsel for the parties, it was felt that the decision of the U.S. Supreme Court in the matter of Keeton v. Hustler Magazine, 682 F.2d 33 (1st Cir. 1982), cert. granted, 103 S. Ct. 813 (Jan. 24, 1983), may be significant on the jurisdictional issue raised by Respondent's Motion to Dismiss. Accordingly, and in the interest of making the most efficient use of judicial proceedings, the parties mutually agreed to hold in abeyance (or, if required by the Rules of the

United States Court of Appeals for the Second Circuit, to withdraw without costs and without prejudice and subject to reinstatement) the appeal of this case pending final disposition by the United States Supreme Court of the matter of Keeton v. Hustler Magazine, supra.

The essential provision of the three-page Stipulation was as set forth in paragraphs 3 and 4 thereof, as follows:

> 3. In the event that the United States Supreme Court affirms the decision of the First Circuit Court of Appeals in Keeton v. Hustler Magazine, above, the instant appeal shall be dismissed with prejudice.
>
> 4. In the event that the United States Supreme Court reverses, remands, modifies, vacates, or otherwise disturbs the ruling of the First Circuit Court of Appeals in Keeton v. Hustler Magazine, this matter may be reinstated in the Court of Appeals for the Second Circuit upon Motion by

Plaintiff-Appellant within thirty days of date of the announcement by the U.S. Supreme Court of its ruling in Keeton v. Hustler Magazine. ...

The above-described Stipulation was filed with the U.S. Court of Appeals for the First Circuit on December 15, 1983.

Thereafter, the U.S. Supreme Court did, on March 20, 1984, announce its Opinion in the case of Keeton v. Hustler Magazine, Inc., et. al., Supreme Court Case No. 82-485. Judgment in the case did not issue until after the expiration of 25 days from the date of the Opinion, i.e., on April 14, 1984, when no peition for rehearing was filed by either party in Keeton v. Hustler Magazine, et. al, supra. The U.S. Supreme Court's Opinion in that case, and cover letter to the U.S. Court of Appeals for the First Circuit, makes it clear that judgment does not issue until

after the expiration of 25 days from the date of the Opinion.

The U.S. Supreme Court's action in Keeton was of the type that would allow reinstatement of Petitioner's appeal in the U.S. Court of Appeals for the Second Circuit pursuant to paragraph 4 of the parties' Stipulation. Upon learning on or about May 10, 1984 of the U.S. Supreme Court's action in the Keeton case, Petitioner, through his attorneys, filed a Motion to Reinstate his appeal. Despite the Stipulation of the parties, Petitioner's Motion was now opposed by Respondents on their claim that it was filed beyond 30 days of the announcement of the Supreme Court of its ruling in Keeton, and that no extension of time beyond the 30 days for said filing should be allowed. On June 4, 1984, the Court denied Petitioner's Motion to Reinstate his appeal. On June 12, 1984, a Motion for Reconsideration of

that ruling was filed by Petitioner, and among the materials filed with the Court in support of the Motion was a letter dated November 11, 1983, between counsel for the parties in this case which addressed the question of the timing for filing a Motion for Reinstatement once the Supreme Court has issued its decision in Keeton v. Hustler Magazine. That letter is attached as Appendix B. By Order of June 20, 1984, the Court again denied Petitioner's Motion to Reinstate.

On June 28, 1984, Petitioner did file its Motion for Reconsideration by a Panel of Judges, attached to which was an affidavit and other statements which reflected the intent of the parties in holding the case on appeal in abeyance until after the Keeton decision by the U.S. Supreme Court. The affidavit is attached as Appendix C.

An oral hearing on Petitioner's Motion was held before a three-judge panel at the U.S.

Court of Appeals for the First Circuit on August 7, 1984. As a result of that hearing, and pursuant to a request by the Panel, the Opinion of the U.S. Supreme Court in the case of Keeton v. Hustler Magazine, et. al, supra, was sent from the Clerk's Office of the U.S. Supreme Court to the Clerk's Office of the U.S. Court of Appeals for the Second Circuit by cover letter dated August 17, 1984. Thereafter, by Order dated September 18, 1984, Petitioner's Motion was denied (Appendix A). This caused Petitioner's case, originating in the U.S. District Court for the District of Vermont, to be, in effect, dismissed with prejudice.

REASONS FOR ALLOWANCE OF THE WRIT

The statement of the Question Presented for Review, ante, sets forth an important question that is presented regarding the fair interpretation and application by other courts of this Court's own Rules, and specifically Rules 51 and 52 of the Rules of the Supreme Court of the United

States which deal with the finality of a judgment. Despite their clarity, Respondents consistently argue that regard should not be given to the 25-day period allowed for the filing of Petitions for Rehearing, but that fairness standards should be measured instead against the March 20, 1984 date. Clearly that is not so. The consequence of not giving true recognition to the intent of the parties in this case is the dismissal of Petitioner's action without it ever being heard on the merits. It is important for the Court to allow the writ in this case so as to remove any possibility of a similar harsh consequence in situations where the outcome of a pending case decision is desired before proceeding further.

Petitioner is not suggesting that there is any ambiguity with respect to the Supreme Court Rules, and indeed believes that there is none, as discussed in more detail infra. The problem occurred in the Court of Appeals' failure to apply the correct starting date in determining whether

Petitioner's Motion for Reinstatement should be granted. The action complained of, although procedural in many respects, is quite substantive for it has determined, and surely will determine in other cases that may be referenced to a Supreme Court's decision, a parties' right to proceed with its cause of action.

At the hearing en banc in the Court of Appeals, it was clear that the Court was adverse to dismissal of an action on a technicality, if one did exist, and in particularly so where the parties by mutual consent had agreed to hold in abeyance further court proceedings on a case in the interests of judicial economy and efficiency pending the outcome of a pending U.S. Supreme Court decision which may have substantial impact on the pending case. The panel of judges, accordingly, requested that a copy of the U.S. Supreme Court's decision in the Keeton v. Hustler Magazine, Inc., et. al case as referenced in the filed Stipulation be forwarded from the U.S. Supreme

Court to the U.S. Court of Appeals for the Second Circuit. Petitioner duly made that transmittal within the subsequent 10-day period as requested by the Panel. However, the cover letter dated April 19, 1984, simply transmitted the U.S. Supreme Court's Opinion which bore the date March 20, 1984. The Court sitting en banc for the Second Circuit apparently concluded from the face of that Opinion that Petitioner's Motion for Reinstatement, filed May 18, 1984, was well beyond 30 days from the March 20, 1984, date present on the Opinion, and therefore far beyond any reasonable zone of timeliness. The Court further ruled that any extension of the 30-day period was inappropriate, and thus dismissed Petitioner's action.

The March 20, 1984, cover letter from the U.S. Supreme Court Clerk's Office to the Clerk of the U.S. Court of Appeals for the First Circuit, in transmitting the Supreme Court's Opinin back to the First Circuit from whence it came, made clear the fact that the Opinion does not become final,

i.e., become a Judgment, until expiration of the 25-day period for the filing of any petition for rehearing, as provided for in Rules 51 and 52 of the Rules of the Supreme Court of the United States. This cover letter sent to the First Circuit, however, was not sent in transmitting the Court's Opinion to the Second Circuit for purposes of this case. Judgment issued in the Keeton v. Hustler Magazine, Inc., et. al case from the U.S. Supreme Court on April 14, 1984, 25 days from the March 20, 1984 Opinion. Petitioner's Motion to Reinstate its appeal in the Second Circuit was filed on May 18, 1984, only some eight days after Petitioner's attorney learned of the final Keeton decision (see affidavit of Richard Affolter, Appendix C). Therefore, on equity grounds, the Motion to Reinstate Petitioner's appeal should have been granted.

An allowance for mailing time from Vermont to the court in New York would have placed the Motion to Reinstate within reason of the stipulated 30 days of the Keeton decision. Respondents,

however, argue that March 20, 1984 should be the benchmark date. Yet as a matter of practicality, it is unreasonable to expect a party to move for reinstatement of its case during the 25-day period during which either side in the Keeton case could have filed a petition for rehearing. The outcome of the Court's ruling on such a petition could have affected the validity of Petitioner's Motion to Reinstate had it been so prematurely filed. Therefore, the mutual intent of the parties to avoid undue expense and burden on the Court by waiting for a decision of finality in a pending Supreme Court case agreed to have substantial impact on the outcome of the present case is wholly defeated! The only reasonable interpretation as to when the 30-day period was to start running is when a final judgment is issued in the case referenced in the parties' Stipulation. This conforms with the intent manifested in the November 11, 1983 letter, and with all rule of reason which comes to bear on a decision of this issue.

This Writ should be granted for the denial of Petitioner's right to proceed with its claim in court under the factual circumstances which underlie this case constitutes an abuse of discretion and brings into play basic due process considerations which are important for this Court to address. This is especially so where the motivating force behind the parties' joint effort to hold a case in temporary abeyance is not to add to the overburdened situation of the Court, but rather to mitigate any undue crowding of the courts' agenda, as well as avoid unnecessary time and expense to the parties and court personnel involved. This is a problem, and the type of consideration by counsel, which is so often recognized and encouraged by the judicial system. When recognition of such matters is given effect through a Stipulation as was filed in this case, only to result in a dismissal with prejudice of a cause even though the reinstatement effort was made only some eight days after the referenced event became known, then questions

relating to abuse of discretion justly come into focus. This is thus a matter of very great substance which needs to be heard by this Court so that its rules continue to be applied and interpreted with a sense of fairness, rather than windfalls, to all parties.

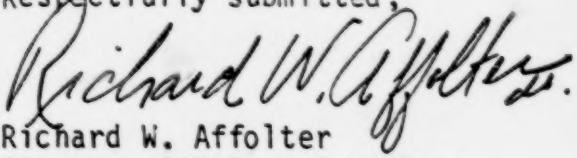
CONCLUSION

For all of the reasons stated above, and those as shown in the appendices attached, it is apparent that the Court of Appeals for the Second Circuit erred in its interpretation as to the date judgment issued in the referenced U.S. Supreme Court case. Applying the correct date which takes into account the 25-day period before Judgment issues on Supreme Court decisions places Petitioner in a reasonable timeliness for seeking to reinstate its appeal.

Therefore, this Petition for writ of certiorari should be granted, and the Second Circuit's granting of Respondents' Motion to Dismiss should be

reversed and the case remanded with appropriate directions.

Respectfully submitted,

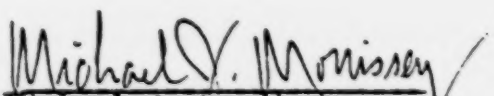


Richard W. Affolter
Pierson, Affolter & Wadhams
253 South Union Street
Burlington, VT 05401
(802) 863-2888

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of December, 1984 served Respondents with the foregoing Petition for Certiorari by placing three (3) printed copies thereof in the U.S. mail with proper first class postage affixed thereto and addressed to their attorney, Brian S. Harvey, Esq., Baker & Hostetler, 818 Connecticut Avenue, N.W., Washington, D.C. 20006.



Michael J. Morrissey
On behalf of Richard W. Affolter, Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Michael J. Morrissey, Plaintiff-Appellant,	) Docket No. 83-7741
v.	) NOTICE OF MOTION
William Morrow and Company, Inc., and Bantam Books Inc., Defendants-Appellees.	) Motion for Reconsideration By Panel of Judges

Brief statement of the relief requested:

Plaintiff-Appellant moves for reconsideration by a panel of judges of Judge Pierce's June 20, 1984 Order denying Plaintiff-Appellant's Motion for Reconsideration.

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

/s/ Circuit Judge

September 18, 1984

APPENDIX B

PIERSON, AFFOLTER & WADHAMS
Law Offices
253 South Union Street
Burlington, Vermont 05401

November 11, 1983

Brian S. Harvey, Esq.
Baker & Hostetler
818 Connecticut Avenue, N.W.
Washington, D.C. 20006

Re: Morrissey v. William Morrow and Company, Inc., et al.

Dear Brian:

I finally got around to dictating the Stipulation in this matter and enclose the same. It seemed logical that I include some type of date by which we would file a Motion for Reinstatement once the Supreme Court has issued its decision in Keeton v. Hustler Magazine. I am not sure what the triggering date should be and am open to your suggestion. I would suggest allowing six months from the "triggering date" so that it will be sufficient if we check on the status of Keeton every couple of months.

We would also be willing to file any Motion to Reinstate within twenty days of the time we receive any actual notice of the Supreme Court decision in Keeton, if appropriate. Perhaps you could telephone me upon receipt of the Stipulation. I will sign it in advance with the hope that you could fill in a blank or two and send it on directly to the Second Circuit after signing.

Thanks for your assistance to date.

Sincerely yours,

Richard W. Affolter
RWA/abt
Enc.

cc: Michael J. Morrissey, Esq.
Clarke A. Gravel, Esq.

P.S. I enclose a copy of the form which the Second Circuit sent to us which is often used in this type of situation but doesn't seem to fit our case well enough. I ignored the procedure of withdrawing the appeal without prejudice to reinstatement in deference to use of the words "held in abeyance" as you had suggested.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL J. MORRISSEY, Plaintiff-Appellant	)	
v.	)	Docket No. 83-7741
WILLIAM MORROW AND COMPANY, INC., and BANTAM BOOKS INC., Defendants-Appellees	)	

AFFIDAVIT

I, Richard W. Affolter, being first duly sworn, depose and say that I am the attorney for Plaintiff-Appellant, Michael J. Morrissey, in the above-entitled case and in support of my Notice of Motion state as follows:

1. On December 15, 1983, I executed a Stipulation (a copy of which is attached hereto as Exhibit A) [Stipulation is not included as part of Appendix. Pertinent portion is as quoted in text.] pursuant to which Plaintiff-Appellant's Appeal in this matter was to be reinstated in the Court of Appeals for the Second Circuit upon Motion within 30 days of the

date of the announcement by the U.S. Supreme Court of its ruling in Keeton v. Hustler Magazine, 52 LW 4346, No. 82-485 (U.S. Sup. Ct. 1984).

2. I agreed to enter into this Stipulation and neither requested nor attended a hearing before this Court in New York to save this Court and the parties the time and expense of such a hearing.

3. As indicated in my November 11, 1983 letter to Attorney Brian S. Harvey (a copy of which is attached hereto as Exhibit B) [Letter is attached to Petition as Appendix B.], I originally suggested that the date from which the time to reinstate the Appeal should run should be six months and that said time should run from the date I received actual notice of the decision in Keeton v. Hustler Magazine, supra.

4. At Attorney Brian Harvey's insistence, the provisions of this proposed Stipulation were changed to provide that the Appeal of the matter was to be reinstated upon motion by Plaintiff-Appellant within 30 days of the date of the

announcement by the U.S. Supreme Court of its ruling in Keeton v. Hustler Magazine.

5. Rather than subject my client to costs of a trip to New York City to attend a hearing at which time the Court would set the terms of the Appeal reinstatement, I agreed reluctantly to the terms proposed by Attorney Harvey.

6. I believe the provisions of the Stipulation which require Plaintiff-Appellant to reinstate his Appeal within "30 days of the date of the announcement by the U.S. Supreme Court of its ruling in Keeton v. Hustler Magazine" are sufficiently broad to mean within 30 days of the date Plaintiff-Appellant received actual notice of said decision.

7. I did not learn of the decision in Keeton v. Hustler Magazine until on or about May 10, 1984 and therefore was unable to file a Motion to Reinstate this matter in the Court of Appeals within the 30 day period prescribed by the attached Stipulation.

8. I do not receive the Wall Street Journal or the Washington Post, which, according to Defendant-Appellee's Statement in Opposition to Plaintiff-Appellant's Motion for Leave to Extend time for Reinstatement of Appeal, published articles regarding the decision in Keeton v. Hustler Magazine. Further, our office does not receive United States Law Week.

9. In summary, I was trying to practice law in the manner in which we practice in Vermont, giving due deference to the Court and other parties to the suit.

Dated this 28 day of June, 1984.

/s/
Richard W. Affolter, Esq.

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Subscribed and sworn to before me on this 28th day of June, 1984.

/s/
Notary Public

My Commission Expires: 2-10-85

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL J. MORRISSEY, Plaintiff-Appellant v. WILLIAM MORROW AND COMPANY, INC., and BANTAM BOOKS INC., Defendants-Appellees	)	Docket No. 83-7741

NOTICE OF MOTION

For Extension of Time to Reinstate Appeal and Reinstate Appeal.

MOTION BY:	OPPOSING COUNSEL:
Richard W. Affolter, Esq.	Brian S. Harvey, Esq.
Pierson, Affolter & Wadhams	Baker & Hostetler
253 South Union Street	818 Connecticut Ave., N.W.
Burlington, Vermont 05401	Washington, D.C. 20006
(802) 863-2888	(202) 861-1559

Has consent of opposing counsel:

A. been sought? Yes

B. been obtained? No

Has service been effected? Yes

Is oral argument desired? Yes

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? No

B. by firm date of argument notice? No

Judge or agency whose order is being appealed:

Judge Albert Coffrin, United States District Court for the District of Vermont

Brief statement of the relief requested: Plaintiff-Appellant moves for leave to extend the time to reinstate his appeal and for leave to reinstate said appeal.

By: (Signature of attorney) Appearing for: (Name Of Party)

Michael J. Morrissey

/S/

Date

Appellant or Petitioner: Plaintiff

IT IS HEREBY ORDERED that the motion be and it hereby is denied

6/4/84 /S/

Date Circuit Judge

(Judge Pierce)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL J. MORRISSEY, Plaintiff-Appellant v. WILLIAM MORROW AND COMPANY INC., and BANTAM BOOKS INC., Defendants-Appellees	Docket No. 83-7741

NOTICE OF MOTION

For Motion for Reconsideration

MOTION BY:	OPPOSING COUNSEL:
Richard W. Affolter, Esq.	Brian S. Harvey, Esq.
Pierson, Affolter & Wadhams	Baker & Hostetler
253 South Union Street	818 Connecticut Ave., N.W.
Burlington, Vermont 05401	Washington, D.C. 20006
(802) 863-2888	(202) 861-1559

Has consent of opposing counsel:

A. been sought? No

B. been obtained? No

Has service been effected? Yes

Is oral argument desired? Yes

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? No

B. by firm date of argument notice No.

Judge or agency whose order is being appealed:

Judge Pierce, United States Court of Appeals for the Second Circuit

Brief statement of the relief requested: Plaintiff-Appellant moves for reconsideration of Judge Pierce's June 4, 1984 Order denying Plaintiff-Appellant's Motion for Leave to Extend the Time to Reinstate his Appeal and For Leave to Reinstate said Appeal.

By: (Signature of attorney) Appearing for: (Name of Party)

Michael J. Morrissey

/S/ 6/12/84

Richard W. Affolter, Esq. Date

Appellant or Petitioner: Plaintiff

IT IS HEREBY ORDERED that the motion be and it hereby is denied

6/20/84	/S/
Date	Circuit Judge (Judge Pierce)

Previous requests for similar relief and disposition: Plaintiff-Appellant previously moved for leave to extend the time to reinstate his Appeal and for leave to reinstate said Appeal, which relief was denied.

Statement of the issue(s) presented by this motion: Should Plaintiff-Appellant's prior Motion for Leave to Extend the Time to Reinstate his Appeal and for Leave to Reinstate said Appeal have been denied?

Brief statement of the facts (with page references to the moving papers): On July 29, 1983, the United States District Court for the District of Vermont granted Defendant-Appellee's Motion to Dismiss on jurisdictional grounds. On August 24, 1983, Plaintiff-Appellant filed a Notice of Appeal of said Order. Subsequently, it was determined by the parties that the case of Keeton v. Hustler Magazine, 52 LW 4346, No. 82-485 (U. S. Sup. Ct. 1984), was pending in the U.S. Supreme Court and that said decision would substantially affect the outcome of

this Appeal. Therefore, by a Stipulation dated December 15, 1983, both parties stipulated that this Appeal should be withdrawn without prejudice and subject to reinstatement pending final disposition by the U.S. Supreme Court of the matter of Keeton v. Hustler Magazine. Pursuant to the Stipulation, the Appeal was to be reinstated upon motion by Plaintiff-Appellant within 30 days of the date of the announcement by the U.S. Supreme Court of its ruling in the Keeton v. Hustler Magazine case. On or about May 10, 1984, Plaintiff-Appellant, through his attorneys, learned of the U.S. Supreme Court's decision in the Keeton v. Hustler Magazine case. As a result of said decision, Plaintiff-Appellant wishes to reinstate his Appeal in this case.

On May 17, 1984, Plaintiff-Appellant moved for leave to extend the time to reinstate his appeal and to reinstate his appeal.

On June 4, 1984, Plaintiff-Appellant learned through a telephone call from the Clerk of the Court of Appeals for the Second Circuit that said Motion had been denied by Judge Pierce. (Subsequently confirmed by written Motion Order from the court.) As a result of this decision, Plaintiff-Appellant respectfully requests that the Court reconsider said decision.

Summary of the argument: Plaintiff-Appellant originall timely filed his Notice of Appeal in this case and wished to pursue said Appeal at that time. However, as an accommodation to this Court, Plaintiff-Appellant agreed to stay said Appeal pending the outcome of the decision in Keeton v. Hustler Magazine. Clearly, Plaintiff-Appellant had the right to pursue this timely Appeal, but to conserve Court time, stipulated to the stay.

To save Plaintiff-Appellant the expense of a trip by his attorney to New York City to determine in person the

conditions of this stay, Plaintiff-Appellant agreed to stipulate with Defendant-Appellee's Attorney Baker. Although Plaintiff-Appellant did not wish to include a provision in the Stipulation that said Appeal must be reinstated within 30 days of the announcement of this decision in Keeton v. Hustler Magazine, supra, the alternative to entering into this Stipulation was to travel to New York and put this Court and the parties to the time and expense of arguing yet another motion.

The substance and purpose of the stipulation between the parties was to assure prompt action on the appeal if Keeton v. Hustler Magazine was reversed. That event occurred, and the reasons for reversal are clearly substantive arguments for reversal of this case. No prejudice has resulted to Defendant-Appellee in the slight delay which may be deemed to have occurred here.